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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

ALEC BERGER et al., Cross-complainants and Respondents, v. GARY S. VARUM et al., Cross-Defendants and Appellants; PHILIP WHITEHEAD et al., Cross-defendants and Respondents	A141112 (San Francisco County Super. Ct. No. CGC-07-462479 & CGC-07-462967)

Gary S. Varum (Gary) and Telesis Engineers (Telesis) agreed to design and oversee construction of a two-family residence for Alec Berger and Nellie Merzheritsky. Vladimir Mirov was hired as the general contractor, and the project proceeded but was riddled with problems. Gary and Telesis abandoned the project in its early stages, and Mirov performed incompetently and quit before completing the residence.

Ironically, Berger and Merzheritsky were sued by Mirov. Mirov's complaint was eventually dismissed. But before it was dismissed Berger and Merzheritsky filed a cross-complaint against Gary and Telesis for breach of contract, negligence, and fraud. Following a bench trial on the cross-complaint, judgment was entered in favor of Berger and Merzheritsky, and they were awarded contractual attorney fees. Gary and Telesis

challenge both rulings. We affirm the judgment, but we reverse the attorney fees award and remand for the trial court to assess whether the fees should be apportioned.

BACKGROUND

In 2002, Berger and Merzheritsky, a married couple, purchased a single family residence at 23 Wood Street in San Francisco. They intended to tear down the existing house and replace it with a two-family residence, where they would live in one unit and rent the other. Through an acquaintance, they were introduced to cross-defendant Alex Varum (Alex), who introduced himself as a real estate broker and said he designed and built real estate with Gary, his father.

Alex presented Berger and Merzheritsky with a "proposal for the design of two-unit dwelling" on Telesis's letterhead.[1] Under a section labeled "scope of work," the proposal stated that Telesis would design a new structure, obtain the various governmental permits necessary for demolition and construction, prepare appropriate plans, provide "technical support of the and [*sic*] construction process" by regularly observing construction and advising the general contractor, and meet with the general contractor to "provide coordination and technical support." The proposal represented that Telesis maintained professional liability insurance of $1 million, and it included a fixed fee of $50,000. The proposal was signed by Gary as "principal."

The parties subsequently agreed to amend the proposal by reducing the fee to $48,000 and providing a more exact description of Telesis's supervisory duties, which included requiring Telesis to observe construction two times per week and to advise Berger and Merzheritsky on its progress. In May 2002, Berger signed the proposal and paid a fee installment of $10,000, making the check payable to Gary at Alex's request. Thereafter, most of Berger and Merzheritsky's dealings with Telesis were through Alex rather than Gary.

[1] At the time, Telesis was a corporation wholly owned by Gary and one other person, who was an "expert in engineering mechanics." Telesis operated from Gary's residence and had no employees other than the two principals.

The design of the new residence proceeded, and in July 2003 Alex told Berger and Merzheritsky it was time for them to find a contractor to demolish the existing structure and construct the new residence. In an e-mail, Alex mentioned the names of two contractors and told Berger that a mutual friend of theirs " 'had a good guy he knows.' " That person turned out to be Mirov. Mirov obtained a set of plans for from Alex and prepared a bid, which Berger and Merzheritsky accepted after consulting with Alex and being told that he found the bid to be reasonable. A set of architectural plans, stamped by Gary as "registered professional engineer," was approved by the San Francisco Planning Department in June 2004.

In early November 2004, while engaging in demolition work, Mirov undermined the foundation of the neighboring property at 21 Wood Street (21 Wood), which was unoccupied at the time. The city stopped work at the site and issued a notice of violation. In a letter, Gary blamed Mirov. Gary initially said he would design a solution to the problem but later claimed he was too busy to do so. On November 11, Berger told Alex that the owner of 21 Wood had threatened a lawsuit. Alex insisted that construction work would resume, but he offered no immediate assistance and thereafter stopped cooperating with Berger and Merzheritsky. On November 16, without having done anything to solve the problems at the job site, Gary sent Berger a letter stating, in full, "This is to inform you that for health reasons the undersigned is not able to continue in the capacity of the project structural engineer for the subject project." Ultimately, the city hired a contractor to perform emergency repairs and demanded Berger and Merzheritsky reimburse the costs.

In January 2005, Berger suffered a heart attack, which he attributed in part to the stress caused by the construction problems. In his words, the project was "a disaster." At some point, Berger and Merzheritsky learned that Telesis had no liability insurance, contrary to its contractual representations. In June 2005, under threat of a lawsuit, Berger and Merzheritsky purchased 21 Wood for $690,000. The badly deteriorated house had been unoccupied for 30 years and was eventually demolished as unsound.

Before construction work resumed in May 2005, Berger asked Alex and Gary to correct a problem with the design of a retaining wall, discovered by Mirov and a foundation contractor he had hired. They refused to help. In a subsequent letter to Berger, Gary denied that Telesis had any responsibility to the project and told Berger that further written correspondence addressed to Telesis would be returned unopened. In the letter, Gary confirmed that he continued to be the engineer of record for the residence. Berger and Merzheritsky thereafter hired cross-defendant Philip Whitehead to complete the work Telesis had left undone.

Construction of the residence proceeded without assistance or oversight from Telesis or Gary. Eventually, Mirov walked off the job, leaving the residence incomplete, and it has never been inhabited. The quality of Mirov's work was shoddy, so much so that it eventually led to the revocation of Mirov's contractor license. The fiasco was emotionally and financially devastating to Berger and Merzheritsky.

Berger and Merzheritsky's expert witnesses testified that Telesis's work had been substandard in various ways. Primarily, the design failed to account for the slope of the land. The property at 21 Wood was a few feet higher in elevation than 23 Wood Street, and the property on the other side of 23 Wood Street was an equal amount lower. But the Telesis plans treated the property as if it were level. As a result, Telesis failed to include foundation-design features to protect the three properties, and construction consistent with the plans would have undermined the foundation of 21 Wood. As one expert testified, "given the fact that the foundation section drawings are incorrect, this creates an automatic potential for disaster." The type of footings specified in the plans was also inappropriate for the sandy soil on the site, and the plans failed to include "cross-sections" required by the building code to describe how adjacent properties might be affected by the work. Further, the usable space in the two-car garage shown on the plans was too small to accommodate two cars properly and correcting the problem would be expensive. Finally, the design allowed water to intrude into the residence. In the years since the residence was built, mold had spread in various areas. An investigation revealed water intrusion had occurred because the foundation and drainage related to

21 Wood had not been properly waterproofed, and because the flashing around the roof was improperly designed.

One expert testified that in addition to improperly designing the residence, Telesis failed to perform many of its other contractual obligations. It failed to retain a geotechnical engineer to prepare a report, provide architectural drawings for electrical, plumbing, and heating systems, estimate construction costs and assist in selecting a contractor, and observe and report on the progress of construction.

The case giving rise to this appeal was originally commenced in April 2007 by, as we have mentioned, Mirov suing Berger and Merzheritsky.[2] Although the docket sheet reveals that a second lawsuit was consolidated with this action, we have no information about that suit. Over a year after Mirov filed his complaint, Berger and Merzheritsky filed a cross-complaint against Gary, Telesis, and a plumbing-and-heating contractor, who later settled. Alex was joined as a Doe cross-defendant much later, and the cross-complaint was eventually amended to assert a claim against Whitehead, who similarly cross-complained against Berger and Merzheritsky.

Berger and Merzheritsky's final cross-complaint asserted claims against Gary and Telesis for breach of contract, professional negligence, and misrepresentation. Several other parties, apparently other subcontractors, were involved in the litigation at various times, but we have no information about the nature of those claims. In 2012, after declaring bankruptcy, Mirov filed a dismissal with prejudice of his claims against Berger and Merzheritsky.

Berger and Merzheritsky, Alex and Gary, Telesis, and Whitehead proceeded to a bench trial in late January 2013. The trial court issued a lengthy tentative decision and eventually entered judgment against Gary and Telesis and in favor of Berger and Merzheritsky for economic damages of $1.6 million and noneconomic damages of $500,000. In its decision, the court found that the parties to the contract were Telesis, on

[2] The appellate record does not contain a copy of the original complaint, nor most other pleadings filed in the action. In recounting this procedural history, we rely primarily on the trial court docket sheet.

one side, and Berger and Merzheritsky, on the other, and it found Gary liable on the contract as an alter ego of Telesis. The court found that Gary and Telesis breached the contract by failing to engage a geotechnical engineer, include various systems in the plans, supervise the construction, and maintain professional liability insurance. And it found that these breaches led to the undermining of the foundation of 21 Wood and its subsequent forced purchase. In addition, the court found both Telesis and Gary liable for professional negligence based on many of the reasons cited by Berger and Merzheritsky's expert witnesses. The economic damages were calculated on the basis of $675,000 to repair the flashing and mold, $250,000 to remodel the garage, $80,000 to waterproof and install drainage, $255,000 in lost rental income for the second unit, $236,000 to reimburse the city, and $80,000 to compensate for the forced purchase of 21 Wood. The court found against Berger and Merzheritsky on their claim for misrepresentation, denied punitive damages, and exonerated Alex. Whitehead was found liable in the amount of $2,700. Later, the trial court granted Berger and Merzheritsky's motion for contractual attorney fees, entering an award of $532,434 in fees against Gary and Telesis.

DISCUSSION

Gary and Telesis assert a variety of legal and factual challenges to the trial court's judgment and the award of attorney fees. We are persuaded by none of them, except we remand the attorney fees award for the trial court to consider an apportionment of the fees.

A. Substantial Evidence Supports the Trial Court's Judgment.

We first reject Gary and Telesis's contention that insufficient evidence supported the verdict. We review a claim of insufficiency of the evidence for substantial evidence. (*David v. Hernandez* (2014) 226 Cal.App.4th 578, 585.) The substantial evidence standard is "highly deferential." (*Silicon Valley Taxpayers' Assn., Inc. v. Santa Clara County Open Space Authority* (2008) 44 Cal.4th 431, 447.) In applying it, "[w]e review the entire record to determine whether there is any substantial evidence, 'whether or not contradicted, which will support the conclusion of the trier of fact. [Citation.] All conflicts must be resolved in favor of the respondent and all legitimate inferences

indulged in to uphold the decision, if possible. We may not reweigh or express an independent judgment on the evidence.' " (*In re N.M* (2009) 174 Cal.App.4th 328, 335.) "Needless to say, a party 'raising a claim of insufficiency of the evidence assumes a "daunting burden" . . . [citation].' " (*Wilson v. County of Orange* (2009) 169 Cal.App.4th 1185, 1188.)

In addition, we apply the doctrine of implied findings in reviewing the judgment here because Gary and Telesis could have, but did not, request a statement of decision. (*Ruiz v. Moss Bros. Auto Group, Inc.* (2014) 232 Cal.App.4th 836, 842.) "This doctrine requires . . . an appellate court [to] presume that the trial court made all factual findings necessary to support the judgment for which substantial evidence exists in the record. In other words, the necessary findings of ultimate facts will be implied and the only issue on appeal is whether the implied findings are supported by substantial evidence." (*Shaw v. County of Santa Cruz* (2008) 170 Cal.App.4th 229, 267.) Under this doctrine, a tentative decision may be used as a guide to the trial court's reasoning, but it is not otherwise relevant in determining whether the judgment is supported by the evidence. (*Id.* at pp. 268, 269.)

Gary and Telesis first contend that the trial court's judgment was not supported by substantial evidence because it failed to take account of Mirov's shoddy work. They rely heavily on the official accusation filed against Mirov before the Contractors' State License Board. But these deficiencies were not the reasons Gary and Telesis were found liable. Gary and Telesis were found liable for their own negligence and contractual breaches, which, according to expert testimony, resulted in the undermining of 21 Wood's foundation, the construction of an undersized garage, and extensive water infiltration into the residence. While it is undoubtedly true that Mirov's poor workmanship made matters worse, the experts' testimony provided ample, and certainly substantial, evidence to support the trial court's judgment against Gary and Telesis.

Gary and Telesis argue that the testimony of Berger and Merzheritsky's experts was insufficient because it did not rely "upon destructive or other testing of 23 Wood to actually ascertain what caused the damage in question" but was instead based on the

experts' observations. Gary and Telesis, however, cite no authority requiring expert testimony in a construction-defects case to include destructive testing. And we can discern no justification for such a rule when experts testify that they were able to form valid opinions without such testing. The opinions of Berger and Merzheritsky's experts were based on the experts' observations and insight, informed by long experience, and were logical and plausible. If Gary and Telesis wanted to discredit these opinions on the basis that they failed to consider the results of destructive testing, or for any other reason, it was their burden—one they never sustained—to do so through cross-examination or by presenting their own expert testimony. " 'The trial court has broad discretion in deciding whether to admit or exclude expert testimony [citation], and its decision as to whether expert testimony meets the standard for admissibility is subject to review for abuse of discretion.' " (*People v. Brown* (2014) 59 Cal.4th 86, 101.) The trial court here did not abuse its broad discretion in relying on the experts' testimony.

Gary and Telesis also dismiss the experts' testimony about the inadequacy of the garage as "[s]peculative." (Boldface omitted.) They argue that the opinion that the garage would not accommodate two cars should have not have been relied upon because the experts never actually tried to park two cars in the garage to see how well they fit. They cite Gary's testimony that he had tested identically sized garages and found that they accommodated two medium-sized cars. But Berger and Merzheritsky's experts did not testify that two cars could not *fit* in the garage; rather, they testified that if two typically sized cars were parked in the garage, the garage would not be reasonably *usable* because too little room would be left for activities such as getting in and out of the vehicles. The testimony was supported by a comparison of the width of two typical vehicles to the internal width of the garage. This testimony constitutes substantial evidence supporting the court's conclusion that the design of the garage was faulty.

Finally, Gary and Telesis contend there is insubstantial evidence demonstrating that the deficiencies cited by the experts were a proximate cause of the conditions for which damages were assessed. As discussed above, however, the experts directly connected deficiencies in the design of flashing and drainage to the problem of water

infiltration, poor design of the garage to the need to reconstruct it, and poor design and the failure to retain a geotechnical engineer and supervise Mirov to the undermining of the 21 Wood foundation. Substantial evidence readily supported the trial court's conclusion that these problems would have been avoided if Gary and Telesis had complied with their contractual and professional duties.

B. Gary and Telesis Were Not Excused from Their Obligations When Gary "Resigned."

Gary and Telesis contend they were not responsible for any damages resulting from the failure to oversee Mirov's work occurring after the date of Gary's letter of resignation in November 2004. But this argument fails to recognize that the contract requiring oversight was not between *Gary* and Berger and Merzheritsky; it was between *Telesis* and Berger and Merzheritsky. By the time Gary purported to resign, Berger and Merzheritsky had paid the full contract price for the various services promised by Telesis and were entitled to full performance. Nothing in the contract permitted Telesis to terminate the contract at will, or upon Gary's incapacity, without incurring legal liability for the failure to fulfill its contractual obligations. Accordingly, if Telesis's assigned principal, Gary, was unable to fulfill his responsibilities under the contract, it was Telesis's responsibility to locate another person to perform those duties. Gary and Telesis are liable under the contract to the extent that the failure to fulfill those responsibilities resulted in compensable damage.

C. The Trial Court Properly Found that Berger and Merzheritsky Did Not Fail to Mitigate Their Damages.

We next reject Gary and Telesis's contention that Berger and Merzheritsky failed to mitigate their damages. " 'The doctrine of mitigation of damages holds that "[a] plaintiff who suffers damage as a result of … a breach of contract … has a duty to take reasonable steps to mitigate those damages and will not be able to recover for any losses which could have been thus avoided." ' [Citation.] Under the doctrine, '[a] plaintiff may not recover for damages avoidable through ordinary care and reasonable exertion.' [Citation.] However, '[t]he duty to mitigate damages does not require an injured party to do what is unreasonable or impracticable.' " (*Agam v. Gavra* (2015) 236 Cal.App.4th 91,

111.) Because mitigation of damages is an affirmative defense, it was Gary's and Telesis's burden to submit evidence of reasonable mitigation measures that Berger and Merzheritsky could have, but did not, take. (*Cordero-Sacks v. Housing Authority of City of Los Angeles* (2011) 200 Cal.App.4th 1267, 1284.) When the trial court finds no failure to mitigate, that finding must be affirmed unless "there was ' " 'uncontradicted and unimpeached' [evidence] 'of such a character and weight as to leave no room for a judicial determination that it was insufficient to support' " ' the finding that [the plaintiff] failed to mitigate his damages." (*Agam*, at p. 111.)

We find no such evidence here. The property was left unfinished by Mirov and had various defects affecting habitation. It may be true, as Gary and Telesis speculate, that Berger and Merzheritsky could have done something to fix those problems and lease one of the units, thereby mitigating their damages. But Gary and Telesis offered no evidence as to what those actions should have been. They rely on Berger and Merzheritsky's evidence of what measures were needed to fix the problems. That evidence shows that those measures were beyond Berger and Merzheritsky's means given the detrimental impact the construction problems had on their personal finances. As a result, we cannot say that the trial court failed to take account of evidence of reasonable mitigation measures that were, as a practical matter, available to Berger and Merzheritsky.

D. The Trial Court Did Not Abuse Its Discretion in Accepting the Qualifications of Berger and Merzheritsky's Experts.

Gary and Telesis contend that neither of Berger and Merzheritsky's experts should have been qualified as experts on the standard of care of licensed professional engineers because neither was a licensed engineer. We disagree. To begin with, contrary to the assumption underlying this argument, there is no requirement that a witness necessarily be licensed in a profession in order to testify as an expert about the standard of care in the profession. (*Cline v. Lund* (1973) 31 Cal.App.3d 755, 766.) " ' "A person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates." ' "

(*People v. Montes* (2014) 58 Cal.4th 809, 861.) " 'Where a witness has disclosed sufficient knowledge, the question of the degree of knowledge goes more to the weight of the evidence than its admissibility.' " (*In re Roberto C.* (2012) 209 Cal.App.4th 1241, 1249.) "While an appellate court may review the trial court's decision [that a witness is qualified to testify as an expert], it may reverse only for an abuse of discretion and must uphold the ruling unless ' " 'the evidence shows that a witness *clearly lacks* qualification as an expert . . . .' " ' " (*People v. Dowl* (2013) 57 Cal.4th 1079, 1089.)

Berger and Merzheritsky's first expert, Peter Daly, was a licensed general contractor who had worked in the construction industry since 1982. At the outset, we question whether Gary and Telesis properly preserved their argument about Daly's qualifications because the record does not reflect that they objected to his testimony below. But even assuming the argument was properly preserved, we reject it. Daly testified that for 10 years he had been a "construction manager" who oversaw residential and commercial construction projects. After that, he became a member of the industry expert panel for the Contractors' State License Board. He testified that he was familiar with the "standards of care for professionals who design and plan buildings." Given his qualifications and long experience in the construction industry, we can find no abuse by the trial court in accepting his testimony as an expert.

Berger and Merzheritsky's second expert, David Helfant, held a Ph.D. in quantative methodology and had done postgraduate work in architecture and engineering. He had substantial work experience as a structural engineer and, like Daly, was a licensed contractor. He estimated he had done "3[,000] to 5,000 structural assessments of buildings over the last 30 years." We can find no abuse of discretion in the trial court's decision to accept his qualifications as an expert in the field of building engineering.

E. Code of Civil Procedure section 338 Does Not Preclude Berger and Merzheritsky From Recovering Their Costs of Repairing 21 Wood.

Gary and Telesis contend that the trial court improperly denied a motion to dismiss Berger and Merzheritsky's claims seeking to recover their costs of repairing 21 Wood based on Code of Civil Procedure section 338, subdivision (b), which

establishes a three-year statute of limitations for actions "for trespass upon or injury to real property." We agree with the trial court.

Berger and Merzheritsky's cross-complaint against Gary and Telesis was filed in July 2008, more than three years after the foundation at 21 Wood was undermined in 2004. The operative pleading, the second amended cross-complaint, asserts causes of action against Gary and Telesis for breach of contract, professional negligence, and fraud. Gary and Telesis argue for the application of section 338 because one element of the damages claimed for each of these causes of action was the costs to repair the 21 Wood foundation.

When considering the applicability of competing causes of action, we must consider "the basic rights of the plaintiff arising out of defendant's wrongful conduct, and . . . the substantive rules applicable to these basic rights." (*Leeper v. Beltrami* (1959) 53 Cal.2d 195, 213.) In doing so, we "look beyond the relief sought, and to view the matter from the basic cause of action giving rise to the plaintiff's right to relief." (*Id.* at p. 214.) As the Supreme Court has paraphrased the test, "[t]o determine the statute of limitations which applies to a cause of action it is necessary to identify the nature of the cause of action, i.e., the 'gravamen' of the cause of action. [Citations.] '[T]he nature of the right sued upon and not the form of action nor the relief demanded determines the applicability of the statute of limitations under our code.' " (*Hensler v. City of Glendale* (1994) 8 Cal.4th 1, 22-23.) The critical factor is "as variously phrased—the nature of the right sued upon, the primary interest affected by the defendant's wrongful conduct, or the gravamen of the action." (*Hydro-Mill Co., Inc. v. Hayward, Tilton & Rolap Ins. Assocciates, Inc.* (2004) 115 Cal.App.4th 1145, 1158-1159.)

We conclude that the gravamen of Berger and Merzheritsky's causes of action was the failure by Gary and Telesis to perform their contractual and professional duties properly, rather than any particular damage resulting from that failure. We reach this conclusion for several reasons. First, Berger and Merzheritsky's "primary right" was not the right to have one's property free from trespass or injury as contemplated in a claim

governed by Code of Civil Procedure section 338, subdivision (b).[3] While a portion of Berger and Merzheritsky's claims arose because 21 Wood was damaged, the right involved in these claims was not a right against invasion of 21 Wood. Berger and Merzheritsky had no such right at the time of the damage because they did not own 21 Wood. Rather, the right involved was the right to have Gary and Telesis perform their duties competently. Similarly, the "primary interest affected by the defendant's wrongful conduct" (*Hydro-Mill, Inc. v. Hayward, Tilton & Rolap Ins. Associates, Inc.*, *supra*, 115 Cal.App.4th at pp. 1158-1159) was not Berger and Merzheritsky's interest in avoiding injury to 21 Wood. As we have discussed, they had no direct interest in avoiding injury to 21 Wood, and they did not seek compensation for the damage to 21 Wood. Rather, they sought reimbursement for the amounts they were required to expend to remediate the damage to the property. Unlike Mirov, Gary and Telesis did not actually harm the property at 21 Wood. Their liability is based on their breach of duty to Berger and Merzheritsky to create plans and supervise the demolition of 23 Wood in a nonnegligent manner. We decline to adopt Gary and Telesis's argument that various statutes of limitation to the same cause of action apply depending on the different aspects of the damages sought.

Gary and Telesis rely primarily *Fireman's Fund Ins. Co. v. Sparks Construction, Inc.* (2004) 114 Cal.App.4th 1135, and *Landale-Cameron Court, Inc. v. Ahonen* (2007) 155 Cal.App.4th 1401, both of which apply section 338, subdivision (b) to negligence claims alleging harm to property. Their reliance is misplaced. In *Fireman's Fund*, the home of the plaintiff's insured was damaged by water leaks caused by a defective toilet ballcock, while in *Ahonen* the plaintiffs' condominium building was damaged by leaks caused by construction defects. These cases are factually distinguishable because the

[3] Section 338, subdivision (b) was originally enacted as a statute of limitations for the tort of trespass. (*Polin v. Chung Cho* (1970) 8 Cal.App.3d 673, 676.) It was later expanded by addition of the phrase "injury to real property" in order to encompass not only trespass, but also actionable injury to real property occurring in the absence of trespass. (*Ibid.*) Either way, subdivision (b) is concerned with claims based on the right against invasion of one's property.

plaintiffs in them, unlike Berger and Merzheritsky, alleged damage to their own property, rather than damages caused as the result of being held responsible for repairs to someone else's property. Because the nature of the claims here are different from the ones in *Fireman's Fund* and *Ahonen*, we cannot assume the applicability of section 338 as the courts did in those cases. (*Fireman's Fund*, at p. 1150; *Ahonen*, at p. 1407.) Instead, we must consider the gravamen of Berger and Merzheritsky's causes as required by *Hensler v. City of Glendale*, *supra*, 8 Cal.4th 1, and this consideration compels us to conclude that section 338, subdivision (b) is inapplicable.[4]

F. Gary and Telesis Forfeited Their Defense Based on the Limitation of Liability Clause.

The contract contains a clause, entitled "Limitation of Liability," purporting to limit Telesis's "total liability to [Berger and Merzheritsky] for any and all injuries" to $50,000, including damages for breach of contract or professional negligence. The parties incorrectly characterize the clause as a "liquidated damages" clause. A liquidated damages clause specifies damages in the event of breach. (E.g., *McGuire v. More-Gas Investments, LLC* (2013) 220 Cal.App.4th 512, 522.) The clause in the contract does not purport to do this. Rather, it limits Gary's and Telesis's maximum liability, not only for breach but for any other cause of action. It is therefore better characterized as a "limitation of liability" clause. (See *Food Safety Net Services v. Eco Safe Systems USA, Inc.* (2012) 209 Cal.App.4th 1118, 1126-1129.) These clauses are generally enforceable if not unconscionable. (*Id.* at p. 1126.)

Berger and Merzheritsky contend that any defense based on the limitation of liability clause was forfeited because Gary and Telesis did not argue below that the clause applied until "an eleventh-hour objection to the proposed judgment." While Gary and

[4] To the extent that Gary and Telesis contend that some other, unspecified statute of limitations might also have been applicable, we find substantial evidence to support a conclusion that Berger and Merzheritsky's causes of action did not accrue until shortly before the filing of the action, when they discovered the inadequacy in Telesis's designs. (See, e.g., *Seelenfreund v. Terminix of Northern California* (1978) 84 Cal.App.3d 133, 137.) Accordingly, the action was timely under other theoretically applicable statutes of limitation.

Telesis disagree that they forfeited the defense, they concede that no testimony about the clause was elicited during trial, and they do not claim to have affirmatively raised the clause until they filed objections to the trial court's tentative decision in December 2013, three months after the trial court filed its tentative decision.

" ' " ' " '[I]t is fundamental that a reviewing court will ordinarily not consider claims made for the first time on appeal which could have been but were not presented to the trial court.' Thus, 'we ignore arguments, authority and facts not presented and litigated in the trial court. Generally, issues raised for the first time on appeal which were not litigated in the trial court are [forfeited].' " ' " ' " (*Gray1 CPB, LLC v. SCC Acquisitions, Inc.* (2015) 233 Cal.App.4th 882, 897.) Gary and Telesis forfeited the protection of the limitation of liability clause when they failed to raise it as an issue prior to or during trial. (*Colony Ins. Co. v. Crusader Ins. Co.* (2010) 188 Cal.App.4th 743, 751 ["Because [plaintiff] failed to raise the issue . . . until its posttrial objections to the statement of decision, it forfeited the argument"].) Gary and Telesis claim the issue was before the trial court merely because the clause was part of the contract, which was admitted into evidence. But the mere presence of the clause in the contract did not constitute an invocation of the defense, and the trial court had no duty to raise it sua sponte. (See *In re Tobacco Cases II* (2015) 240 Cal.App.4th 779, 804.)

Although we have the discretion to consider pure issues of law raised for the first time on appeal (*Nathan G. v. Clovis Unified School Dist.* (2014) 224 Cal.App.4th 1393, 1397, fn. 3), this case does not present such an issue because unresolved questions of fact could affect the issue's resolution. One such question involves Telesis's failure to obtain professional liability insurance. The contract states, "Telesis Engineers maintains professional liability insurance in an amount of $1,000,000 in coverage for an individual claim as specified in Section 15 of the attached Standard Conditions." Section 15 of the Standard Conditions is the limitation of liability clause. Although that clause contains no express mention of insurance, the reference raises at least the possibility that maintenance of professional liability insurance was a reason Berger and Merzheritsky ostensibly accepted the limitation of liability clause. This question might have been explored in the

trial court had Gary and Telesis timely presented a limitation of liability defense. Further, given the presence of the limitation of liability clause in what is essentially a nonnegotiated addendum to the contract, there is a potential question whether the term was unconscionable. (See, e.g., *Steven v. Fidelity & Casualty Co.* (1962) 58 Cal.2d 862, 879; *Lhotka v. Geographic Expeditions, Inc.* (2010) 181 Cal.App.4th 816, 821-824.) But again, by failing to assert the clause in a timely manner before or during trial, Gary and Telesis denied Berger and Merzheritsky and the trial court the opportunity to address these factual issues. They therefore forfeited the defense. (See, e.g., *Quantification Settlement Agreement Cases* (2011) 201 Cal.App.4th 758, 813-814 [new issues generally not considered on appeal unless pure question of law on undisputed facts]; *Blankenship v. Allstate Ins. Co.* (2010) 186 Cal.App.4th 87, 105 [factual arguments raised for the first time on appeal generally not considered].)

G. The Record Does Show that the Trial Court Properly Considered Apportioning the Attorney Fees Award.

While they do not dispute Berger and Merzheritsky's entitlement to contractual attorney fees in general, Gary and Telesis contend that the trial court abused its discretion in awarding them an amount equal to *all* of the attorney fees Berger and Merzheritsky incurred in the consolidated actions, without limiting the fees to those incurred in the litigation of their claims against Gary and Telesis. We agree and remand because the record does not show that the trial court considered apportioning attorney fees.

In their motion for fees, Berger and Merzheritsky stated they were represented by two law firms. The first firm represented them from October 2006 through April 2011, including the filing of the other, consolidated action.[5] The second firm, which took over in May 2011, tried the case against Gary and Telesis, Alex, and Whitehead. Although the proceedings involved two actions and a variety of parties, Berger and Merzheritsky's motion for fees made no attempt to explain how the fees related to the various claims and

[5] The attorney billing entries for March through May 2007 reflect the preparation and filing of a complaint. Since this action was commenced by Mirov's filing of a complaint, these entries presumably refer to the complaint in the other action.

parties. Instead, the motion simply argued that Gary and Telesis should be liable for *all* the fees because "[t]he culpability of the Telesis/Varum parties was not readily discovered due to the technical nature of the engineering and design services they contracted to provide and their denials of responsibility." They cited, in particular, the refusal by Gary and Telesis to acknowledge the existence of the contract as an example of the "immense burden which the Telesis/Varum parties imposed on" them.

In their opposition to the motion, Gary and Telesis pointed out that 12 parties participated in the litigation at one time or another, in addition to themselves and Berger and Merzheritsky. Even at trial, there were two additional cross-defendants, Alex and Whitehead. They argued that all of the fees requested by Berger and Merzheritsky were not necessarily incurred in litigating against them. In a declaration, Gary and Telesis's counsel proposed that the fees incurred by Berger and Merzheritsky's first attorneys be apportioned equally among the 14 parties other than Berger and Merzheritsky who participated in the early portion of the litigation. As to the second attorneys, counsel suggested that the fees be apportioned among the seven parties other than Berger and Merzheritsky who participated during that portion of the litigation. Without explanation, the trial court awarded Berger and Merzheritsky all the fees they requested.

The general rule is that a trial court may only award attorney fees incurred in connection with the litigation of claims for which the recovery of fees is permitted. " 'Where a cause of action based on the contract providing for attorney[] fees is joined with other causes of action beyond the contract, the prevailing party may recover attorney[] fees under [Civil Code] section 1717 only as they relate to the contract action.' [Citations.] The prevailing party therefore must generally allocate the attorney fees it incurred between the causes of action on the contract and the noncontract causes of action. [Citations.] [¶] Attorney fees, however, 'need not be apportioned when incurred for representation on an issue common to both a cause of action in which fees are proper and one in which they are not allowed. All expenses incurred with respect to [issues common to all causes of action] qualify for award.' [Citations.] The governing standard is whether the 'issues are so interrelated that it would have been impossible to

separate them into claims for which attorney fees are properly awarded and claims for which they are not . . ." (*Brown Bark III, L.P. v. Haver* (2013) 219 Cal.App.4th 809, 829-830.)

There is no question that the causes of action for which Berger and Merzheritsky were entitled to recover in this action—their successful claims against Gary and Telesis—were joined with claims for which Berger and Merzheritsky had no such entitlement. While the appellate record is incomplete regarding the other claims litigated in the two consolidated lawsuits, it is clear that Berger and Merzheritsky litigated claims against parties other than Gary and Telesis—at a minimum, Mirov, Alex, Whitehead, and the plumbing contractor. They also defended against claims brought by Mirov. Several other entities were also parties at various points, although we have no information about the nature of the claims asserted by or against them.[6] In addition, the trial involved an unsuccessful claim for fraud against Gary and Telesis, as well as the prosecution of claims against Alex and Whitehead that were not covered by the contract. Berger and Merzheritsky are not entitled to recover fees incurred in connection with these other claims in absence of a finding by the trial court that the various claims involved common or interrelated issues.

On the record before us, we cannot determine whether all the various claims against all the parties involved common or interrelated issues. But we have reason to doubt they did. The present lawsuit was pending for over a year before Gary and Telesis were even joined as parties.[7] When claims for which attorney fees can be recovered are joined after the initial filing of an action, the prevailing party is generally not entitled to recover fees incurred prior to their joinder. (*Sweeney v. McLaran* (1976) 58 Cal.App.3d

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[6] Default was entered against many of these parties. It is therefore possible that the fees incurred in connection with their participation were minimal.

[7] Because we have no records from the action consolidated into this case, we cannot be certain whether Gary and Telesis were parties to the other action. But they do not appear to have been, at least initially. There is no reference to them in the first attorney billing records until October 2007, when the attorney began to draft an amendment to the "complaint" to add "the engineer."

824, 830.) Further, as discussed above, many of the project's problems derived from Mirov's shoddy performance rather than from malfeasance by Gary and Telesis. As is this case, *Heppler v. J.M. Peters Co.* (1999) 73 Cal.App.4th 1265 was a construction dispute involving several parties and allegations of a variety of construction defects. (*Id.* at pp. 1272-1273.) The plaintiffs prevailed at trial on a claim against the roofing subcontractor, and the trial court entered an award against that subcontractor of all of the plaintiffs' attorney fees for trial preparation and trial time. The Court of Appeal reversed the award and remanded for "redetermination" (*id*. at p. 1297) because the trial court made no attempt to apportion the attorney fees between compensable and noncompensable claims, noting that the case could have been tried more quickly in the absence of the claims against other subcontractors. In so doing, the court concluded that it was "eminently unfair to tag [the roofing subcontractor] with all of plaintiffs' attorney fees for the entire seven-week trial." (*Ibid*.)

While the manner of apportionment of attorney fees between compensable and noncompensable claims is vested in the sound discretion of the trial court, it is an abuse of discretion for the court to make no attempt whatsoever to apportion. (See, e.g., *Zintel Holdings, LLC v. McLean* (2012) 209 Cal.App.4th 431, 444; *Graciano v. Robinson Ford Sales, Inc.* (2006) 144 Cal.App.4th 140, 159; *Heppler v. J.M. Peters Co., supra*, 73 Cal.App.4th 1265 at pp. 1297-1298.) " 'Where discretion has been exercised in a manner that exceeds the applicable legal standards, the proper remedy is to reverse the order and remand the matter to the trial court in order to give it the opportunity to make a ruling that comports with those standards.' " (*Graciano,* at p. 159.) We therefore reverse the trial court's award of attorney fees and remand for a redetermination. In doing so, we do not suggest approval of the mechanical method of apportionment suggested by Gary and Telesis in the trial court. While there were four parties at trial, for example, it is clear that most of the trial time was spent on issues involving Gary and Telesis. We simply remand for the trial court to exercise its discretion and consider the relationship of the various claims and parties and to limit any award of attorney fees to those incurred in connection with compensable claims.

DISPOSITION

The award of attorney fees to plaintiffs is reversed and remanded to the trial court for redetermination in accordance with the views expressed in this opinion. In all other respects, the judgment is affirmed. The parties shall bear their own costs on appeal. (Cal. Rules of Court, rule 8.278, subd. (a)(3).)

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Humes, P.J.

We concur:

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Dondero, J.

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Banke, J.